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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 308

ALBERT HOELSKEN and LEONARD AMATO,
d/b/a ACTIVE RUBBISH SERVICE,

Petitioners,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO and JAKE SCHLAGEL, d/b/a AURORA AND EAST DENVER TRASH DISPOSAL, individually and as a representative of a class of persons similarly situated, Et Al

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

OPINION BELOW

Set forth verbatim as Appendix A to the Petition.

JURISDICTION

Petitioners state jurisdiction is conferred by 28 U.S.C. 1257(3), which respondents challenge.

28 U.S.C. 1257(3) requires, as here pertinent, that the validity of a state statute as being repugnant to the Federal Constitution must be drawn into question in the court below.

The question raised below is set forth at page 5 of the Petition as follows:

> 8. That the action of the Public Utilities Commission in attempting to regulate a business not within its *statutory* authority deprives the plaintiffs and all other persons similarly situated of their property without due process of law and denies to them equal protection of the law, contrary to the Constitutions of the State of Colorado and the United States of America. (R 40) (*our emphasis*)

This is simply a question of statutory interpretation to determine whether persons engaged in the transportation of ashes and trash are within the ambit of the Colorado statute.

The Supreme Court of Colorado held that persons engaged in the ash and trash business were within the statutory jurisdiction of the Public Utilities Commission. This decision, on nonfederal grounds, then completely nullified the federal question raised below.

It is a well settled rule that this Court not only accepts, but is bound by the construction given state statutes by state courts and that such construction is not subject to review, even though the effect of such construction is to remove any repugnancy to the Federal Constitution. See, among others, *Quong Ham Wah Co.* v. *Industrial ACC. Commission of California,* 255 U.S. 445, 448 (1921); *Tampa Waterworks Co.* v. *Tampa,* 199 U.S. 241 (1905); Price v. *Illinois,* 238 U.S. 446 (1915); *Aero Mayflower Transit Co.* v. *Board of R.R. Com'rs of State of Montana,* 332 U.S. 495

(1947); *Thornton* v. *Duffy*, 254 U.S. 361 (1920); and *Guaranty Trust Co.* v. *Blodgett*, 287 U.S. 509 (1932).

Petitioners now present an entirely new federal question for review by this Court, i.e., "whether the Legislature of the State of Colorado can constitutionally include persons engaged in the transportation of ashes and trash within the regulatory control of the Public Utilities Commission?".

A party who has raised but one federal question in the state court cannot in the United States Supreme Court argue, in addition thereto, another not raised in the courts below. *Dewey* v. *City of Des Moines, Iowa*, 173 U.S. 193, 197, 198 (1899); *Keokuk & H. Bridge Co.* v. *Illinois*, 175 U.S. 626, 633-635 (1900); and *Wilson* v. *Cook*, 327 U.S. 474, 483 (1946).

That the present question was not raised in the first instance to the courts below is admitted by petitioners, for at page 8 of their Petition it is stated:

> . . . *the constitutional proscription against the state regulatory powers here asserted was not presented in the first instance to the Colorado Supreme Court.* When that Court, without reference to the above principles, made the determination that it did make, Petitioners clearly and unequivocally asserted in Petition for Rehearing that the opinion and decision ran counter to the Federal Constitution. (*our emphasis*)

A federal question raised for the first time on a petition for rehearing, after judgment has been rendered by the state court, comes too late for consideration by the United States Supreme Court. See *Bushnell* v. *Crooke Mining & Smelting Co.*, 148 U.S. 682, 689 (1893); *McMillen* v. *Ferrum Mining Co.*, 197 U.S. 343, 347 (1905); *Kansas City Star Co.* v. *Julian*, 215 U.S. 589, 590 (1909); *Rooker* v. *Fidelity Trust Co.*, 261 U.S. 114, 116, 127 (1923); *Live Oak Water Users' Asso.* v. *Railroad Commission*, 269 U.S. 354,

357 (1926); and *Herndon* v. *Georgia,* 295 U.S. 441, 442, 443 (1935).

We recognize that there are some exceptions to the general rule that this Court will not consider a federal question first raised on a petition for rehearing. These exceptions are where the state court actually entertained the federal question raised and decides it, see *Herndon* v. *Georgia, supra,* and where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.,* 287 U.S. 358, 366 (1932).

Neither of the above exceptions are applicable to the present case. The State Supreme Court denied the petition for rehearing without giving reasons (R. 97). This does not show that the state court passed upon the federal question first raised by the petition. *Forbes* v. *Virginia State Counsel,* 216 U.S. 396, 398, 399 (1909). Also, see *Waters-Pierce Oil Co.* v. *Texas,* 212 U.S. 112, 118 (1909).

The second exception, i.e., the state decision presented a new and unexpected basis of a federal claim and the petition for rehearing was the first opportunity to present the federal question, also is inapplicable. When briefs were submitted to the Colorado Supreme Court, the Colorado Legislature had amended C.R.S. 1963, 115-9-1 (4) (a) to specifically include in the definition of a "motor vehicle carrier" those persons engaged in the transportation of ashes and trash. See Appendix B of the Petition, pages 25 and 26.

The petitioners were well aware of this amendment, for an entire section of their brief in the Colorado Supreme Court was devoted to arguing that this amendment established the fact that the Public Utilities Commission did not, prior to this amendment, have authority to regulate the "ash and trash" business. In fact subheading C of heading II states:

> The Act of the Legislature of May 1965 amending the subject statute so as to thereafter include the

"ash and trash" business within the regulatory authority and powers of the Public Utilities Commission is a clear indication that such business was not so embraced and included prior to the amendment. (Page 42, Petitioners' Brief in the Colorado Supreme Court).

No argument was advanced by the petitioners in their Colorado Supreme Court brief that the legislature did not have the constitutional right to regulate the "ash and trash" business, but only that it had not been regulated prior to the 1965 amendment. The Colorado Supreme Court, however, held that by this amendment "the legislature did not change the law; it merely clarified it" (App. A of Petition, p. 24).

From all of the above it is clear that petitioners have completely failed to sustain their burden of showing that this Court has jurisdiction to review the question presented for review here. It is, therefore, respectfully requested that this Honorable Court dismiss this Petition for Writ of Certiorari on the basis of a lack of jurisdiction.

QUESTION PRESENTED

Whether the petitioners have been deprived of their property without due process of the law and denied equal protection of the laws by the inclusion by the Legislature of the State of Colorado of persons engaged in the transportation of ashes and trash under the regulatory control of the Public Utilities Commission.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes listed in the Petition are supplemented as follows:

1963 C.R.S., 115-11-3(3) — This article shall not apply to any motor vehicle carrier as defined by section 115-9-1, nor shall anything herein con-

tained be construed or applied so as to compel a private carrier by motor vehicle to the laws or liability applicable to a common carrier.

STATEMENT OF THE CASE

By decision No. 21790 dated March 13, 1967 the Supreme Court of the State of Colorado held that the Statutes of the State of Colorado imposed jurisdiction on the State Public Utilities Commission to regulate the transportation of ashes and trash. (Opinion set forth as appendix A to the petition) Petition for rehearing was denied April 3, 1967.

Based on this state court interpretation of a state statute petitioners herein under date of June 29, 1967, seek the issuance of a writ of certiorari directed to the Colorado Supreme Court on the grounds that regulation of transporters of ashes and trash by the Public Utilities Commission is repugnant to the Federal Constitution as being beyond the regulatory authority of the State Legislative. These grounds, if heretofore raised at all, were mentioned only in the petition for rehearing.

Respondents herein are comprised of the Public Utilities Commission together with the following named parties each of whom is authorized to transport ashes and trash by the Public Utilities Commission: JAKE SCHLAGEL, d/b/a AURORA AND EAST DENVER TRASH DISPOSAL, individually and as a representative of a class of persons similarly situated, DAVID BRANDT, BESTWAY DISPOSAL, a partnership, J. W. BURBACH HAULING SERVICE, COOK AND BOLGER, a partnership, HERB DALBERG, d/b/a DALBERG'S HAULING SERVICE, GEORGE FLINT, d/b/a ARVADA RUBBISH REMOVAL, METROPOLITAN TRASH, INC., GEORGE GETTMAN, JAKE GINTHER, VIC GINTHER, GRAFF'S RUBBISH REMOVAL, MARION GILREATH, d/b/a WHEATRIDGE DISPOSAL SERVICE, C. N. NIBLACK RUBBISH REMOVAL, HAROLD ROBINSON, ADAM SCHLAGEL, d/b/a A & F TRASH DISPOSAL,

GEORGE SCHIMPF, EDWARD SCHNORR and ROBERT SCHNORR, d/b/a IDEAL DISPOSAL CO., GEORGE SHAFFER, ALFRED STRASSHEIM, C. E. STRASSHEIM, ADAM TREBER & SON, a partnership, N. W. COYLE, MOUNTAIN VIEW RUBBISH REMOVAL, LAKEWOOD DISPOSAL SERVICE, ELMER LEICHNER, ROBERT LEICHNER, LARRY LEICHNER and JOHN LEICHNER, d/b/a BESTWAY, DONALD S. JOHNSON, d/b/a JOHN'S TRASH SERVICE, SANITARY GARBAGE & TRASH REMOVAL SERVICE, SANITARY GARAGE & TRASH REMOVAL CORPORATION, A Colorado corporation, BECKER'S TRASH SERVICE, INC., THOMAS E. SALMON, JR., d/b/a SECURITY GARBAGE CO., ESTES SERVICE CO., GARBAGE SERVICE CO., ESTES TRASH SERVICE, DENVER CLEAN UP SERVICE, INC., BOB JOHNSON SERVICE, DECKER DISPOSAL, INC., MONARCH DISPOSAL, ACE DISPOSAL SERVICE, DISPOSAL SERVICE CO., FREDDIE'S RUBBISH REMOVAL, ENGLEWOOD LITTLETON RUBBISH REMOVAL, RAY'S ASH & TRASH, BOULDER DISPOSAL, INC., ALEX GERLACH & SONS, and DENVER WASTE DISPOSAL.

Aforesaid parties respectfully file the within brief in opposition to the stated petition.

ARGUMENT

If this Court should determine that it has jurisdiction to review the question presented, it is clear that the question so presented does not involve any special, important or unsettled issues that warrant review by this Court.

Petitioners in seeking review of the constitutional right of the State of Colorado to regulate carriers performing intrastate for-hire motor transportation service state "these Petitioners have been denied their property without due process of law and have been denied the equal protection of the law" (Petition, p. 9).

Thus, in very broad terms they allege that they have

been deprived of their rights as protected by Amendment XIV, Section 1, of the United States Constitution (Petition, p. 2). In so arguing their 14th Amendment rights they have completely neglected to set out in any detail or specificity how the Colorado statutes deny petitioners of due process, be it procedural or substantive, nor do they set forth how and in what fashion the classification of the transportation of ashes and trash within the regulatory statutes is an unreasonable or arbitrary classification.

Colorado, in its statutory enactments concerning the regulation of motor carriers, set up three classifications of motor carriers. These classifications are (1) "Motor Vehicle Carrier", which is a common carrier, and said carriers are controlled by C.R.S. 1963, 115-9-(1-15), (App. B Petition, p. 2), (2) "Private Carrier by Motor Vehicle", which in the terms of the Interstate Commerce Act are contract carriers and their activities are controlled by C.R.S. 1963, 115-11-(1-16), (App B Petition, P. 25), and (3) "Commercial Carrier by Motor Vehicle", which are own-haul carriers, and these carriers are regulated by C.R.S. 1963, 115-10-(1-14), (App. B Petition, p. 24).

Carriers in each of the above classifications are subjected to different regulations with the most comprehensive regulations being placed on the common carriers and the least regulations placed on commercial carriers.

Every state in the Union has similar acts controlling the operation of motor carriers. In light of the numerous decisions of this Court upholding the right of states to place reasonable regulations on the operation of private carriers, as well as regulating common carriers, the petitioners' claim that they are a private business and not subject to the control of the State is absurd.

As a primary example of the states' right to regulate private, as well as common carriers, we need only refer to *Stephenson* v. *Binford,* 287 U.S. 251 (1932). This case was an appeal from the United States District Court for the Southern District of Texas, wherein, before the statu-

tory court of three judges, an injunction was sought by appellants to restrain various officials of the State of Texas from enforcement of a state statute which purported to regulate the use of its highways by motor trucks. The United States District Court denied the injunction and the case was appealed to the United States Supreme Court.

The appellants severally were engaged in the private transportation of freight by motor trucks between various cities in Texas under private contracts with shippers. While operating under these contracts the state statute regulating carriers was passed. This statute required common carriers to obtain a certificate of public convenience and necessity, and private contract carriers to obtain a permit, before they would be allowed to operate over the highways of Texas. The statute provided that such permits should be granted only after a hearing and not if the Commission should be of the opinion "that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory.

The grounds upon which the statute was attacked were stated as follows:

> (1) That as applied to appellants, all of whom are private contract carriers, the result of the statute is to compel them to dedicate their property to the quasi-public use of public transportation before they can operate their motors over the highways, and thus to take their property for public use without adequate compensation and to deprive them of their property without due process of law. In other words, the alleged effect of the statute is to convert the private carriers into common carriers by legislative fiat. (2) That the business of appellants is not affected with a public interest, and the provisions of the statute so declaring in terms, or in effect, constitute an attempt to deprive appellants of their property without due process of law, and to abrogate their right of private contract. (3)

> That the statute by requiring appellants to obtain a permit in the nature of a certificate of public convenience and necessity subject them to other regulations before they can lawfully operate upon the highways, which regulations are not imposed upon other private carriers similarly situated, and thereby appellants are denied the equal protection of the laws. (4) That other regulations to which appellants are subjected are not made applicable to persons using the highways in transportation of their own commodities under substantially similar conditions, and thereby appellants are denied the equal protection of the laws." (287 U.S. at 263 and 264).

This Court in affirming the District Court's denial of the injunction and upholding the validity of the Texas statute first stated the following:

> . . . It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit. (287 U.S. at p. 264)

This Court went on to state that in light of the legislative power to regulate the use of the state highways that it was unnecessary for it to determine whether appellants were "engaged in a business impressed with a public interest" (287 U.S. 265).

In rejecting appellants' claims that the Texas statute was an attempt to convert private contract carriers into common, this court held:

> We are of opinion that neither by specific provision or provisions, nor by the statute considered as a whole, is there an attempt to convert private contract carriers by motor into common carriers. Certainly, the statute does not say so. Common

carriers by motor and private contract carriers are classified separately and subjected to distinctly separate provisions. By section 1 (h), the contract carrier is defined as "any motor carrier . . . transporting property for compensation or hire over any highway in this state *other than as a common carrier.*" It is difficult to see how the legislature could more clearly have evinced an intention to avoid an attempt to convert the contract carrier into a common carrier. It is true that the regulations imposed upon the two classes are in some instances similar if not identical; but they are imposed upon each class considered by itself, and it does not follow that regulations appropriately imposed upon the business of a common carrier, may not also be appropriate to the business of a contract carrier. (287 U.S. 265 and 266).

After thus rejecting appellants' claims that the Texas statute compelled private carriers to become common, the court went on to consider the constitutionality of the various regulations placed on the private contract carriers. These regulations were found not to be repugnant to the Constitution, not on the theory that the business in question was effected with a public interest, but on the grounds that the state in regulating the use of its highways had the right to regulate private carriers in making the highways safer, even if such regulations involve a lessening of commercial transportation. Among others, some of the legislative ends sought by the means of regulating carriers, both private and common, were found to be (1) to make the use of the highways safer and more convenient for these private operators, involving incidentally a lessening of commercial transportation on the highways, (2) unregulated truck transportation had caused a serious public problem concerning the use of the highways, (3) the great increase of contract carriers in the aggregate caused the problem the legislature tried to regulate, (4) without the regulation of private carriers the inevitable result will be the disappearance altogether of common carriers from the

roads, and (5) for the public to continue to have a safe and dependable transportation system, private carriers operating on the same roads with common carriers must be subject to reasonable regulations.

Although we perhaps have devoted too lengthy a discussion to *Stephenson* v. *Binford,* it was done so because of the similarity of the arguments used there to the arguments used in the present petition. Appellants in *Stephenson* basically raised the same contentions raised here by petitioners, i.e., (1) their business is not "affected with a public interest" and therefore not subject to state control, and (2) the Colorado statute compels them to become common carriers by mere legislative fiat.

If petitioners' first argument is not destroyed by *Stephenson* v. *Binford, supra,* then most assuredly the case of *Nebbia v. New York,* 291 U.S. 502 (1934), leaves no question that petitioners' position is untenable, for the United States Supreme Court, speaking through Mr. Justice Roberts, after citing *Stephenson* v. *Binford, supra,* with approval, stated:

> The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest" and "clothed with a public use", have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of

> its aspects, including the prices to be charged for the products or commodities it sells. . .
>
> So far as the requirement of due process is concerned, and in the absence of the constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose. The courts are without authority either to declare such policy, or when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine." *Northern Securities Co.* v. *United States,* 193 U.S. 197, 337-8. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise . . ." (291 U.S. at p. 536-537)

Despite the holding in this case, petitioners none the less argue that the state cannot regulate their business of transporting ashes and trash. In support of this contention they cite at page 12 of their Petition *New State Ice Co.* v. *Liebmann,* 285 U.S. 262 (1932). *Liebmann,* however, is of little value today for as was stated in *Boylan* v. *United States,* 310 F.2d 493, 497 (9th Cir. 1962) -

> But two years after Liebmann was handed down, the Supreme Court decided Nebbia v. New York, . . . In that case the concept "affected with a public interest" was abandoned as a test to be applied in determining whether a business could, consistent

with due process, be subjected to economic regulation.

While Nebbia involved price regulation, the rationale there adopted by the court is equally applicable with regard to all economic regulations. The contrary rationale of Liebmann has not been applied or approved in any subsequent case."

(Footnotes omitted)

For an extensive annotation of additional decisions, both federal and state, upholding the right of the state to regulate both private and common carriers see 109 A.L.R. 550 (1937) and 175 A.L.R. 1333 (1948). From these and numerous other decisions there should be no question that the state legislature can adopt reasonable regulations concerning the operations of petitioners, be it common carriage or private carriage, and the right to regulate such business does not turn on the concept of "affected with a public interest", but rather turns on the question of whether the laws so regulating are arbitrary in their operation and effect. As previously pointed out, appellants have completely failed to even attempt to show that the regulation of motor carriage in Colorado is arbitrary, discriminatory and not in furtherance of the public welfare. This complete lack of evidence is adequate grounds for the refusal of this Honorable Court to grant certiorari.

Petitioners by citing such cases as *Frost Trucking Co.* v.*Railroad Commission,* 271 U.S. 583 (1926), and*Visco* v. *State,* 95 Ariz. 154, 388 P.2d 155 (1963), which cases stand for the proposition that a state cannot by mere legislative fiat compel a private carrier to become a common carrier, apparently take the position that the Colorado statutes compel them to become a common carrier. To show that this contention has absolutely no foundation we need only look at the insertion in Colorado's Private Carrier Act at C.R.S. 1963, 115-11-3(3), the following provision:

This article shall not apply to any motor vehicle carrier as defined by section 115-9-1, nor shall any-

thing herein contained be construed or applied so as to compel a private carrier by motor vehicle to the laws or liability applicable to a common carrier.

Thus, the *Visco* holding, that the transportation of ashes and trash, within the meaning of the Arizona statutes, to be a private or contract type undertaking and, therefore, not within the Arizona's common carrier statute and not being within said statute the state could not compel the private carrier to become a common carrier, is not in conflict with Colorado law since Colorado regulates the transportation of ashes and trash under both the Common and Private Carrier Act and expressly forbids the placement of private carriers under the laws and liabilities of common carriers.

In summary, the petitioners have made a general and broad attack upon the right of Colorado to regulate their for-hire transportation of ashes and trash with no showing that such regulation is unreasonable, arbitrary or unlawful. Colorado is not unique in exercising control over the transportation of ashes and trash for virtually all the states in the Union have asserted control over such transportation. For example, see *Masgai* v. *Public Service of Pennsylvania,* 124 Pa Super. 370, 188 Atl. 599 (1936); *State* v. *Diamond Tank Transport,* 2 Wash. 2d 13, 97 P.2d, 145 (1939); and *City of Wichita Falls, et al* v. *Kemp Hotel Operating Co., et al, Court of Civil Appeals of Texas, Ft. Worth,* 162 S.W. 2d 150 (1942).

For numerous years many persons, including respondents, who are engaged in business similar to petitioners, have abided by and followed the regulations that have been adopted by the Colorado Legislature. Petitioners have had equal opportunity to obtain a permit or certificate from the Colorado Public Utilities Commission. Petitioners make no claim that procedural due process has been denied them in any attempt to get a certificate. Petitioners have, therefore, completely failed to present a meritorious and

substantial federal question that warrants review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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